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In The

# Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

*Petitioner,*

*vs.*

V&M ERECTORS, INC.,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITIONER'S REPLY BRIEF ON CERTIORARI

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13 pp

## TABLE OF CONTENTS

*Page*

Table of Contents ..... i

Table of Cited Authorities ..... ii

Discussion ..... 1

There is conflict amongst the circuits on the issue that petitioner raises, i.e., in a hostile-environment employment discrimination case, to whom must a plaintiff complain in order to impose respondeat superior liability on the employer ..... 1

The Court's two recent sexual harassment decisions dealt with employer liability for supervisory harassment, focusing on principles of agency, while the Court expressly did not reach the question raised here, i.e., what notice would be sufficient to impose respondeat superior liability ..... 5

The Court should grant certiorari, vacate and remand to the Court of Appeals for reconsideration in the light of its decision in *Faragher v. City of Boca Raton* ..... 6

## TABLE OF CITED AUTHORITIES

**Cases:**

*Allen v. Tyson Foods, Inc.*,
121 F.3d 642 (11th Cir. 1997) ..... 2

*Cross v. State of Alabama*,
49 F.3d 1490 (11th Cir. 1995) ..... 2

*Bonenberger v. Plymouth Township*,
132 F.3d 20 (3rd Cir. 1997) ..... 5

*Faragher v. City of Boca Raton*,
Case No. 97-282 (June 26, 1998) ..... 2, 5, 7

*Griffith v. Kentucky*,
479 U.S. 314, 321 n. 6 (1986) ..... 8

*Harper v. Virginia Dept. of Taxation*,
509 U.S. 86, 125 L.Ed.2d 74 (1993) ..... 6-7, 8

*Huddleston v. Roger Dean Chevrolet, Inc.*,
845 F.2d 900 (11th Cir. 1988) ..... 3

*James B. Beam Distilling Co. v. Georgia*,
501 U.S. 529 (1991) ..... 8

*Kilgore v. Thompson & Brock Management, Inc.*,
93 F.3d 752 (11th Cir. 1996) ..... 2

*Reynolds v. CSX Transportation, Inc.*,
115 F.3d 860 (11th Cir. 1997) ..... 2

*Reynoldsville Casket Co. v. Hyde*,
514 U.S. 749, 131 L.Ed.2d 820 (1995) ..... 6, 7

*Splunge v. Shoney's, Inc.*,
97 F.3d 488 (11th Cir. 1996) ..... 3

*Torres v. Pisano*,
116 F.3d 625 (2nd Cir. 1997) ..... 5

*Watts, Watts & Company, Limited v. Unione Austriaca Di Navigazione & Co.*,
248 U.S. 9 (1918) ..... 8

*Young v. Bayer Corp.*,
123 F. 3d 672 (7th Cir. 1997) ..... 3, 4

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## PETITIONER'S REPLY BRIEF ON CERTIORARI

## DISCUSSION

1. THERE IS CONFLICT AMONGST THE CIRCUITS ON THE ISSUE THAT PETITIONER RAISES, I.E., IN A HOSTILE-ENVIRONMENT EMPLOYMENT DISCRIMINATION CASE, TO WHOM MUST A PLAINTIFF COMPLAIN IN ORDER TO IMPOSE

RESPONDEAT SUPERIOR LIABILITY ON THE EMPLOYER.

Respondent acknowledges that Petitioner complained to V&M superintendent Jimmy Sutton about her treatment on Dave Sargent's crew, Brief in Opposition at 4, and that Sutton took the allegations to Vernon Nix, *id.* at 7, the sole officer, director and shareholder of Respondent, *id.* at 1, "the only person who could hire or fire," *id.* at 18, only after making an ineffectual attempt to remedy the situation himself. Respondent nonetheless argues that the company should escape liability for the treatment of Petitioner by the Sargent brothers because there was no awareness of the harassment by "management" higher than Sutton. *Id.* This argument – the position taken by the district court — is consistent with, and a logical extension of, the "higher management" doctrine espoused by the Court of Appeals for the Eleventh Circuit in *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997) (reversing summary judgment on constructive-knowledge grounds, but affirming that because the plaintiff had failed to complain to company officials "for Tyson to be liable under Title VII for hostile environment sexual harassment, the alleged harassment must have been so pervasive that Tyson is deemed to have constructive knowledge of it") (citing *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir. 1997) (en banc)[1]); *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 866 (11th Cir. 1997) (also citing *Faragher*, 111 F.3d at 1538); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996); *Cross v. State of Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995), and

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[1] This Court reversed the Eleventh Circuit and remanded for reinstatement of the district court judgment. *Faragher v. City of Boca Raton*, Case No. 97-282 (June 26, 1998).

*Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). *See also Splunge v. Shoney's, Inc.*, 97 F.3d 488, 488-489 (11th Cir. 1996) (categorizing as "lower management" everyone below the level of the regional director of a restaurant chain and affirming liability verdict only because evidence supported a finding of constructive knowledge by "higher management" because of failure to post a sexual harassment policy).

Respondent's attempt to reconcile the district court's reasoning (and, per force, the reasoning of the panels in *Allen*, *Reynolds*, *Splunge*, *Kilgore* and *Huddleston*, as well as that of the *en banc* majority in *Faragher*) and that of the other circuits in *Young v. Bayer Corp.*, 123 F.2d 672 (7th Cir. 1997) is unavailing. For example, Respondent attempts to aggrandize the department head in *Young*, arguing that "no one at V & M has authority remotely approaching that of the department head in *Young*, other than Vern Nix." Brief in Opposition at 19. Bayer Corp., meanwhile, sought exactly the opposite spin, "argu[ing] absurdly, in the teeth of its own policies as well as of good sense, that in a corporation the size of Bayer the head of a department of 'only' 60 workers is too far down the corporate ladder to count." *Young*, 123 F.3d at 675. As the *Young* court observed, significantly for the case at bar: "Most companies do not have as many as 60 workers." *Id.*

What is important in comparing *Young* and the case at bar is not the size of the company, or the relative rank of the supervisors, but rather the way in which the *Young* court formulated and answered the crucial question.

Question: "The plaintiff's appeal presents an important question: what is the lowest level in a

corporate or other institutional hierarchy at which notice to an employee of sexual harassment is deemed notice to the employer?" 123 F.3d at 672-673.

Answer: "[W]hat is possible to identify is who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it. These two questions should guide the inquiry in cases in which the question is whether the plaintiff placed her complaint in a proper channel." 123 F.2d at 675.

That is in sharp contrast to the district court's application of what it understood as the Eleventh Circuit's "higher management" rule, especially as applied to smaller employers:

> The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher manager" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. . . .

Appendix at 15a.

The reasoning of the district court, of the line of cases on which it relied, and of the Court of Appeals that affirmed the judgment clearly is in conflict with that of the

Court of Appeals for the Seventh Circuit in *Young*.[2]

2. THE COURT'S RECENT SEXUAL HARASSMENT DECISIONS DEALT WITH EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT, FOCUSING ON PRINCIPLES OF AGENCY, WHILE THE COURT EXPRESSLY DID NOT REACH THE QUESTION RAISED HERE, I.E., WHAT NOTICE WOULD BE SUFFICIENT TO IMPOSE RESPONDEAT SUPERIOR LIABILITY.

There were two questions presented in *Faragher* — one about agency, which the Court did answer, and the other about notice, which the Court did not. The *Faragher* court found that "the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable (as would be any consideration of negligence as an alternative to a theory of vicarious liability here)." Bench Op., at 32. Thus, it did not reach one of the questions on which the Court had granted certiorari: "May a fact-finder infer notice to an employer of hostile-environment sexual harassment... through actual notice to an intermediate supervisor, who reports it no further."

While that question was important in *Faragher*,

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[2] *Young* is the principle case upon which Petitioner relies as establishing conflict. *Bonenberger v. Plymouth Township*, 132 F.3d 20, 27 & n. 7 (3rd Cir. 1997) is cited to for the purpose of illumining how low-level a supervisor can be, in that case sergeants, with their knowledge still being deemed knowledge of the employer. *Torres v. Pisano*, 116 F.3d 625, 637 (2nd Cir. 1997) further suggests an approach that differs from the Eleventh Circuit's "higher management" doctrine.

and while both sides briefed it extensively, the issue could not be determined there without further factfinding on remand — unnecessary factfinding in light of the Court's imposition of liability on the basis of agency principles. The question remains both important (and growing more so as the Court of Appeals for the Eleventh Circuit persist in its "higher management" doctrine for notice)[3] and unanswered by this Court. For in cases involving co-worker discrimination, the crucial issue is whether notice is followed by effective reaction or by inaction. The trigger point is notice. The issue in this case is whether notice to Jimmy Sutton was notice to V & M.

If the issue was important enough to be among those upon which certiorari was granted in *Faragher* — in that case, whether the women lifeguard's complaints to Robert (Flash) Gordon, a lifeguard captain who did nothing with the information, constituted notice to the City of Boca Raton — surely it remains important enough to grant certiorari in the case at bar.

3. THE COURT COULD GRANT CERTIORARI, VACATE AND REMAND TO THE COURT OF APPEALS FOR RECONSIDERATION IN THE LIGHT OF ITS DECISION IN *FARAGHER*.

The Court, in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 131 L.Ed.2d 820 (1995), synthesized its prior decision in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 125 L.Ed.2d 74 (1993) as holding that

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[3] *See* discussion *supra* of *Allen* and *Reynolds*, both of which came later than the en-banc *Faragher* decision and followed one of those portions of *Faragher* upon which the Court granted certiorari, as well as of *Splunge*, *Kilgore*, *Cross*, and *Huddleston*.

> [w]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events.

*Reynoldsville Casket Co.*, 131 L.Ed.2d at 826. A new rule announced by the Court "must be given full retroactive effect in all cases still open on direct review...." *Harper*, 125 L.Ed.2d at 86.

In *Faragher*, the Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Bench Opinion, at 29-30.[4] In the case at bar, one of Graff's antagonists was David Sargent, her foreman,[5] who not only watched while his brother, Ray,

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[4] Petitioner sought and obtained an enlargement of time until June 17 for the filing of the petition, based on the pendency of *Faragher*. When she finally filed it, she suggested a vacation and remand of the case at bar in the event that the Court answered affirmatively the question that Faragher presented about notice to an intermediate supervisor — the question that the Court did not reach. Petition at 10, n. 6. Respondent addressed *Faragher* in its brief in opposition.

[5] Petitioner, while having alleged in her complaint that David Sargent was an "agent" of respondent, did not press that point in her brief nor in her petition. Although petitioner is aware that the Court generally does not deal with matters raised for the first time in a petition for certiorari, the Court's issuance of its opinion in *Faragher* represents a sea change in employment discrimination law, making available relief to petitioner that was not available under prior precedent in the Eleventh Circuit. As the late

(continued...)

engaged in crude sexual behavior towards Graff, but who himself did such things as endanger Graff by ordering her to tie a column of iron during a thunderstorm.

Graff's case is still, in the words of *Harper*, "open on direct review...." A decision is "final," and thus impervious to a change in the law, when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1986) (holding "that a new rule of for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final..." 479 U.S. at 328). "*Griffith* cannot be confined to the criminal law. Its equality principal, that similarly situated litigants should be treated the same, carries comparable force in the civil context." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Granting certiorari, vacating the decision of the Court of Appeals and remanding for reconsideration to apply the new rule of law announced in

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[5](...continued)
Mr. Justice Brandeis observed in *Watts, Watts & Company, Limited v. Unione Austriaca Di Navigazione & Co.*, 248 U.S. 9 (1918) (reversing dismissal of admiralty claim against an Austro-Hungarian company because of the outbreak of World War I, but abating it till the end of hostilities):

> This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require.... And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below.

248 U.S. at 21 (citations omitted).

*Faragher* to the case at bar.

Respectfully submitted,

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